80-1076

Supreme Court, U. S.
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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EASTERN AIR LINES, INC.

Petitioner,

v.

CATHERINE M. BURWELL, ET AL.,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Eastern's mandatory leave policy for flight attendants during the first thirteen weeks of pregnancy violates §703(a) of Title VII.[1]

[1] The parties to this proceeding are Eastern Air Lines, Inc., Appellant in the Fourth Circuit and Catherine M. Burwell, Jean H. Proctor, and Sharon D. Clayton, Appellees in the Fourth Circuit.

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Petitioner, Eastern Air Lines, Inc., conditionally prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit *only* if the Court grants the petition for writ filed on November 28, 1980, in *Burwell* v. *Eastern Air Lines, Inc.*, Case No. 80-868.

OPINIONS BELOW

The *en banc* opinion of the Fourth Circuit is unofficially reported at 23 FEP Cases 949 (1980) and is attached as Appendix A to the petition for writ of certiorari in the case

of *Burwell* v. *Eastern Air Lines, Inc.*, Case No. 80-868. The opinion of the United States District Court for the Eastern District of Virginia is reported at 458 F. Supp. 747 and also appears as Appendix B to the *Burwell* petition for writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 29, 1980. On December 1, 1980, Eastern received a copy of a petition for writ of certiorari in *Burwell* v. *Eastern Air Lines, Inc.*, Case No. 80-868. This court's jurisdiction is invoked under 28 U.S.C. §1254 (1) and Rule 19.5 of the Rules for the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are §703(a) and (e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2(a) and (e)(1). These statutory provisions are reproduced as Appendix C to the petition for writ in Case No. 80-868.

STATEMENT OF THE CASE

A. Background

This action was brought by Plaintiffs, Catherine M. Burwell, et al., on September 27, 1974, in the Richmond Division of the United States District Court for the Eastern District of Virginia. In their complaint, Plaintiffs challenged every aspect of Eastern's maternity policies, including hospitalization, disability and sick-leave plans, transfer and reinstatement policies, denial of certain employee benefits

associated with active service, and the requirement that flight attendants take maternity leave of absence upon knowledge of pregnancy.

On O tober 9, 1975, upon Eastern's motion, the *Burwell* case was certified as a class action under Rule 23(b)(1) and (2) of the Federal Rules of the Civil Procedure. A trial was held before the Honorable Robert R. Merhige, Jr., from May 24, through May 26, 1976, and on September 6, 1978, the District Court issued an Opinion and Order granting judgment to Eastern on all the benefit issues and entering judgment for Plaintiffs on the issue of mandatory maternity leave prior to the first twenty-eight weeks of pregnancy, transfer of pregnant flight attendants to ground positions without loss of seniority, and the period of guaranteed reinstatement after delivery.

Eastern appealed the District Court's opinion on mandatory maternity leave to the Fourth Circuit, and on August 29, 1980, the Fourth Circuit, in an *en banc* ruling, reversed the District Court's ruling that Eastern's mandatory maternity leave policy for flight attendants was unlawful beyond the thirteenth week. The reversal of the District Court's opinion between the thirteenth and twenty-eighth week of pregnancy, is the subject of the petition for writ in *Burwell* v. *Eastern Air Lines, Inc.*, Case No. 80-868. Three judges would have upheld the *entire* policy pertaining to mandatory maternity leave for flight attendants and wrote or joined in dissenting opinions. This cross petition for writ of certiorari involves only that part of the rule from the knowledge of pregnancy up through the thirteenth week of pregnancy.

B. Statement of Facts

The policy involved in this cross-petition as well as the petition filed in No. 80-868 is set forth in the collective bargaining contract:

> H. Flight Attendants shall, upon knowledge of pregnancy, discontinue flying as a Flight Attendant. Upon request, the Company will grant such Flight Attendants leaves of absence for maternity purposes.

The primary duty of a flight attendant is to insure the well-being of passengers in the event of an emergency. The flight attendant's ability to perform becomes critical in an emergency in which passengers are dependent on flight attendants to guide or carry them to safety. The flight attendants may be the only persons in the cabin familiar with the locations of exits and the operation of emergency equipment, and it is their responsibility to insure that passengers are evacuated as rapidly as possible.[2]

Four physicians testified at the trial concerning the physiological problems associated with pregnancy and their impact upon a flight attendant's ability to perform her routine and emergency duties. These physicians considered pregnancy in terms of three trimesters of approximately thirteen weeks.

Early in pregnancy most women complain of fatigue and need excessive periods of sleep. Nausea and vomiting are common in the first trimester and may be aggravated by food odors, smoke, fatigue, vibration or motion. Ten to

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[2] FAA regulations require that all aircraft must be evacuated within 90 seconds. The FAA also requires that as a minimum that there be one flight attendant for every 50 seats on an airplane. The FAA regulations also prohibit any person from serving as a flight attendant who is not capable of using emergency equipment or performing functions necessary in an evacuation or other emergency.

fifteen percent of all pregnancies will result in miscarriage; eighty to ninety percent of these miscarriages will occur before the twelfth week of pregnancy. An additional ten percent of pregnant women will suffer symptoms of miscarriage such as bleeding or cramps but will not abort. There is no effective treatment for miscarriage; women who are bleeding are usually advised simply to lie down.

If a miscarriage occurs after the early weeks of pregnancy, it is ordinarily disabling and may be very painful. Except in the case of women who are habitual aborters, it is impossible to predict which women will miscarry or when a miscarriage will occur during the course of pregnancy. The operational problems to an airline with flight attendants flying while pregnant are substantial. The most significant of these during the first trimester of pregnancy is that of miscarriage while working on the airplane.

C. The Opinions of the Lower Courts

The District Court found that Eastern's requirement that flight attendants take leave upon knowledge of pregnancy established a *prima facie* case of discrimination under Title VII. The District Court proceeded to analyze the policy under both the business necessity test and the *bona fide* occupational qualification defense set forth in §703(e) of Title VII. The District Court found that the business necessity test was not satisfied because Eastern's interest in the health and well being of the flight attendant was not sufficiently compelling to override any discriminatory impact (201a). The District Court found that "at some point, pregnancy hinders flight attendants in the adequate performance of their duties, and this compromises the safe and efficient operation of the aircraft" (203a), but that the business necessity test was not met because "Eastern

has not chosen the least restrictive alternative." (203a). The District Court further held that being less than twenty-eight weeks pregnant was a *bona fide* occupational qualification (BFOQ) for being a flight attendant (215a) and that non-pregnancy is a BFOQ for flight attendants at any stage of pregnancy on flights or flight sequences "of more than six hours duration" (213a, fn. 14). The District Court further concluded "that it is possible and practical to determine individually which pregnant flight attendants may not be able to perform their assigned duties adequately due to pregnancy" (208a-209a) and that "at any given time during an individual woman's pregnancy, the onset of miscarriage or premature delivery is predictable prior to the actual disablement." (212a).

The Fourth Circuit affirmed the District Court's enjoining of Eastern's mandatory maternity policy for the first thirteen weeks of pregnancy. The Fourth Circuit reversed the District Court's ruling that Eastern must evaluate each individual flight attendant as to whether or not she can perform her duties between the thirteenth and twenty-eighth week of her pregnancy. The Petitioners in *Burwell* v. *Eastern Air Lines, Inc.*, No. 80-868 have filed a petition for writ of certiorari on the reversal between the thirteenth and the twenty-eighth week. Eastern believes that the *Burwell* petition for writ should be denied, but if it is granted, then the Court should also grant this cross-petition for writ of certiorari.

REASONS FOR GRANTING THIS CROSS-PETITION FOR A WRIT

If the Court decides that the petition for a writ in *Burwell* v. *Eastern Air Lines, Inc.*, No. 80-868 should be granted, then it should also grant this cross-petition. This cross-petition should be granted because the issue presented

by the cross-petition is inescapably interwoven with the issues presented in the *Burwell* petition for certiorari. Indeed, only by granting this cross-petition would the Court have the whole case before it and be able to review in a meaningful manner the opinion of the Fourth Circuit.

The question presented by this cross-petition is that reflected by the 6 to 3 vote of the Fourth Circuit. Three judges of the Fourth Circuit believed that the mandatory maternity leave rule should be upheld as promulgated. This position has substantial support in the decisions of other federal courts which have faced this issue. *Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. den.* 435 U.S. 934 (1978); *Harriss* v. *Pan American World Airways*, 437 F. Supp. 413 (N.D. Cal. 1977), aff'd .... F.2d .... No. 78-1214 (9th Cir. Dec. 23, 1980); *EEOC* v. *Delta Airlines*, 441 F. Supp. 626 (S.D. Tex. 1977), reversed and remanded on procedural grounds, 619 F.2d 81 (5th Cir. 1980); *Air Line Pilots Ass'n* v. *Western Air Lines*, 22 E.P.D. ¶30, 636 (N.D. Cal. 1979).

As Judge Murnaghan said in his dissenting opinion in this case:

> The medical evidence supports a conclusion that a pregnant flight attendant may be somewhat less able to respond in a complete and efficacious manner. The testimony unequivocally establishes that, although, if healthy, a flight attendant during the first thirteen weeks could perform as effectively as though she were not pregnant, a substantial disability could occur in the event of a miscarriage. Miscarriage is defined as the termination of pregnancy before the twentieth week. Miscarriage is an illness confined to pregnancy, and its occurrence in the first thirteen weeks is frequent enough that the airline here was justified in giving the attention it gave to the increased risk, and in removing pregnant flight attendants from service immediately on hearing of the pregnancy.

> The airline charged with the safety of its passengers and crew should be entitled to take the change in the risk factor into account by doing what it reasonably can to preclude any palpable growth in the risk. . . .

(87a-89a) [3]

CONCLUSION

For these reasons, this cross-petition for a writ of certiorari should be granted *if* the Court concludes that a writ of certiorari should issue in the case of *Burwell et al.* v. *Eastern Air Lines, Inc.*, No. 80-868.

Respectfully submitted,

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Dated: December 31, 1980

[3] This Court in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 590-591 (1979) approved of a practice which excluded all methadone users from employment because a less inclusive rule would increase the risks to the public.

CERTIFICATE OF SERVICE

I, Paul M. Thompson, Counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing cross-petition for writ of certiorari in the United States Mail, first class postage prepaid, this 31st day of December, 1980, addressed to:

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